STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 10, 2008
v	No. 274505 Wayne Circuit Court
DAVID WILSON, Defendant-Appellant.	LC No. 06-007762-01

Before: O'Connell, P.J., and Borrello and Gleicher, JJ.

PER CURIAM.

After a bench trial, defendant was convicted of two counts of operating a vehicle while intoxicated and with a minor in the vehicle (second offense), MCL 257.625(1) and (7)(a)(ii), and a count of driving with a suspended license (second offense), MCL 257.904(1) and (3)(b). The trial court sentenced defendant to a two-year term of probation. Defendant appeals as of right. We affirm, and decide this appeal without oral argument pursuant to MCR 7.214(E).

Kenneth Gregones testified that at approximately 1:30 a.m. on June 17, 2006, he was driving southbound on I-275. Gregones described that after moving from the right to the center lane, he came up suddenly behind a Yukon, which Gregones believed had stopped. Gregones swerved but could not avoid a collision with the rear of the Yukon. Gregones pulled over to the shoulder of the freeway and parked, then ran back to check on the occupants of the Yukon, which had come to rest in the right lane perpendicular to the freeway. Gregones observed a young boy, approximately five years of age, in the front passenger seat, an older boy about ten years of age in the backseat, and defendant lying "on the passenger side floorboard."

Police Officers Scott Hughesdon and David Schreiner testified that on arriving at the scene, they found defendant outside the Yukon. According to the officers, defendant, who seemed "very groggy" and "confused," admitted that he owned the vehicle and was driving it before the accident, but that he seemed "very unsure" of how the accident occurred. When asked if he had any passengers, defendant told Schreiner that he was alone. Schreiner subsequently located defendant's two sons, aged six and nine, sitting in a bystander's car. When defendant failed to produce a driver's license or vehicle registration, Hughesdon asked his dispatcher to check the secretary of state records; the dispatcher reported that defendant had a suspended license.

Hughesdon, who initially thought defendant may have experienced disorientation from the accident, recalled that he later noticed signs of intoxication, including an odor of intoxicants emanating from defendant. Hughesdon administered field sobriety tests, which defendant failed. A preliminary breath test of defendant at the scene registered a blood alcohol level of 0.18, and a subsequent breath test at the station yielded a blood alcohol level of 0.17.

Defendant and two defense witnesses testified that defendant, his sons, and his cousin, Phillip Bryant, visited the home of Viola Buckens on the evening of June 16, 2006, and that defendant consumed alcohol that evening. Defendant, Bryant and Buckens averred that around 1:00 a.m. on June 17, 2006, defendant, who seemed either tired or intoxicated, gave his keys to Bryant, who drove defendant and his sons toward home. Defendant sat in the front passenger seat, his sons sat in the backseat, and defendant fell asleep in the car.

Bryant testified that instead of going directly home, he decided to visit a female friend, but got lost on the way there. According to Bryant, he was on I-275 when defendant awoke. Bryant and defendant described that they began to argue over Bryant's detour, that defendant ordered Bryant out of the car, and that Bryant pulled over to the shoulder, got out of the vehicle and walked down the freeway, until a passing driver picked him up and took him to a gas station.

Defendant testified that after Bryant's departure, one of his sons said he did not feel well. Defendant recalled that he removed his seatbelt and began reaching back to pull his son into the front seat, when someone struck the rear of the vehicle, knocking defendant out of his seat. Defendant denied telling the officers that he had been driving before the collision.

Defendant contends on appeal only that he was denied a fair trial due to ineffective assistance of counsel. Specifically, he contends that counsel should have objected to hearsay evidence that he had a suspended license, which testimony violated his right of confrontation. Because defendant failed to raise this claim before the trial court in a motion for a new trial or a request for an evidentiary hearing, we limit our review of this claim to the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

> To prevail on a claim of ineffective assistance of counsel, a defendant must show that his counsel's performance was objectively unreasonable and the representation was so prejudicial that he was deprived of a fair trial. To demonstrate prejudice, the defendant must show that, but for counsel's error, there was a reasonable probability that the result of the proceedings would have been different. This Court presumes that counsel's conduct fell within a wide range of reasonable professional assistance, and the defendant bears a heavy burden to overcome this presumption. [*People v Watkins*, 247 Mich App 14, 30; 634 NW2d 370 (2001), aff'd 468 Mich 233; 661 NW2d 553 (2003).]

"This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). The decision whether to object to evidence constitutes a matter of trial strategy. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

The only evidence introduced by the prosecutor that defendant's license had been suspended at the time of the June 2006 accident constituted Hughesdon's testimony that his dispatcher advised him of the suspension. That testimony clearly qualifies as hearsay, MRE 801(c), and thus inadmissible. MRE 802. The Confrontation Clause prohibits testimonial statements by a witness who does not appear at trial, unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. *People v Jambor*, 273 Mich App 477, 486; 729 NW2d 569 (2007), citing *Crawford v Washington*, 541 US 36, 60-68; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

Because a Confrontation Clause-based objection by defense counsel presumably would have led to the exclusion of Hughesdon's hearsay testimony, we will assume for purposes of analysis that defense counsel performed unreasonably in failing to object. Notwithstanding any error by counsel, however, defendant has failed to substantiate that he endured any resultant and significant prejudice. At no time either before the trial court or on appeal has defendant contested the notion that he in fact had a suspended or restricted driver's license in June 2006, which may have permitted him to drive but only for employment or community service purposes, and defendant does not dispute on appeal that the prosecutor could have obtained and introduced admissible evidence of the suspension or restriction in the form of certified secretary of state documentation, either pursuant to MRE 803(6) or (8). See *Jambor*, *supra* at 487 (observing that business records generally do not qualify as testimonial under the Confrontation Clause). Therefore, even had defendant's trial counsel lodged an objection to Hughesdon's testimony about information relayed by the police dispatcher, the prosecutor could have established the fact of defendant's license restriction or suspension by other available and admissible means. In summary, we find no reasonable likelihood that but for counsel's error, a different bench trial verdict would have resulted.

Affirmed.

/s/ Peter D. O'Connell
/s/ Stephen L. Borrello
/s/ Elizabeth L. Gleicher